82 NO. 1178

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FLOYD ROOD

Petitioner,

versus

PETER FINNEY, JR., and
UNITED PRESS INTERNATIONAL

Respondent.

ON WRIT OF CERTIORARI TO THE LOUISIANA
SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I

Whether summary judgment against a public figure plaintiff was appropriate in an action for libel where the plaintiff was prevented from presenting direct evidence of actual malice in opposition to the motion for summary judgment.

II

Whether the failure to retract or correct an admittedly libelous statement can constitute a reckless disregard of the truth irrespective of whether there was actual malice in the initial publication.

PARTIES

Petitioner, Floyd Rood, is a person of the full age of majority and a resident of the State of Louisiana.

Respondent, United Press International, Inc., is a corporation doing business in the State of Louisiana.

Respondent, Peter Finney, Jr., is a person of the full age of majority and a resident of the State of Louisiana and at all times pertinent hereto, an employee of United Press International, Inc.

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OPINION BELOW

The decision of the Louisiana Supreme Court denying certiorari appears in Appendix p. A-8 hereto. The opinion the Louisiana Fourth Circuit Court of Appeals appears in Appendix p. A-2 hereto. The decision of the Civil District Court for the Parish of Orleans appears in Appendix p. A-1 hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on October 8, 1982. This petition

for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

United States Constitution, Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of greviences.

United States Constitution, Amendment 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Plaintiff, Floyd Rood, is a 74 year old professional golfer. In the 1950's Mr. Rood established the Floyd Rood in Sports Foundation, a tax exempt organization devoted to youth assistance work, particularly those youths afflicted by drug addiction. One of the unique ways in which Mr. Rood raises money for Foundation activities is by engaging in "highway golf," that is, a promotional activity whereby Mr. Rood

would hit a golfball(s) cross country. Funds were raised through sponsors who would pay the Foundation an amount of money for each yard or mile covered by Rood or who would purchase the golf balls that Rood had used.

As a part of the promotion of these fund raising activities, Mr. Rood would give radio and television interviews as well as interviews with other aspects of the public media. At issue in this litigation is a newspaper article written by Peter Finney, Jr. (Finney, Jr.) on October 3, 1978, on the occasion of the beginning of one of Mr. Rood's "highway golf" tours, the purpose of which was to raise money to purchase a Narcotics Education Trailer to be used at various high schools.

After an interview with Mr. Rood, Peter Finney, Jr., an employee of United Press International (hereinafter referred to as UPI), typed his story into a video display terminal in the New Orleans UPI office. After a review of the article, the story was transmitted by computer command over telephone lines to the UPI office in Dallas, a regional editing center for UPI.

According to the deposition testimony of Mr. Finney, Jr., the third paragraph of his article on Mr. Rood, as originally transmitted by Finney, Jr., read as follows:

> From the Atlantic to the Pacific, Rood has nudged screamers down America's interstates and rural dirt roads. For every person he has hit, he has missed millions, which is quite an accomplishment in 20 years of highway golf, the sport he invented to help solve *the* drug addiction problem. (emphasis added)

At some point after Finney, Jr.'s transmission of the story from the New Orleans UPI office, the underscored word in the above excerpt was altered by a UPI employee from "the" to "a" and finally to "his". The altered version which appeared in the October 4, 1978 edition of the *Houston Chronicle* and other newspapers, read as follows:

> . . . 20 years of highway golf, the sport he invented to help solve *his* drug addiction problem. (emphasis added)

It is this printed version which is the subject of Mr. Rood's lawsuit. Contrary to the statement in the above quoted article, Mr. Rood has never had a drug addiction problem of any kind whatsoever and has furthermore spent most of his adult years *combating* narcotics addiction in young people.

After the publication of this article, Mr. Rood made an appointment with Finney, Jr., to discuss the disputed statement. Mr. Finney, Jr., recalled without a doubt that Mr. Rood had wanted a retraction or clarification. Mr. Finney, Jr., in a written memorandum to another employee of UPI Joey Reaves, stated that he *knew* that Mr. Rood never had a drug problem and that Rood wanted a retraction.

Mr. Finney, Jr., reported his conversation with Mr. Rood to Joey Reaves, UPI bureau manager, and was told that Reaves "would look into it". Mr. Finney, Jr., made no further inquiries as to any action taken by Reaves pertaining to a retraction, nor did Mr. Reaves ever contact Mr. Rood about the article in question.

Mr. Finney, Jr., later wrote another story about Mr. Rood's highway golf, but no attempt was made to clarify or retract the statement in the first article that is at issue here.

It is the publication of the false statement in the October 4, 1978 article and the failure to retract or clarify, after being fully apprised of the defamatory statement that has given rise to the issues in this case.

This is a defamation action brought by a public figure plaintiff against a defendant news organization. As such, the First Amendment Constitutional issue herein presented was raised by the filing of this action in the Civil District Court for the Parish of Orleans, State of Louisiana. The Fourteenth Amendment Constitutional issue was raised by the summary dismissal of this lawsuit.

Plaintiff, Floyd Rood, filed this suit in the Civil District Court for the Parish of Orleans, on August 31, 1979, against Peter Finney, Jr., and United Press International, Inc., requesting damages for defamation of character, mental anguish and emotional distress, as well as attorney's fees and punitive damages.

On October 3, 1980, the defendants (Finney, Jr., and UPI) filed a motion for summary judgment. In a judgment rendered on February 19, 1981, the Honorable Gerald Federoff, Louisiana District Court Judge, granted the defendants' motion for summary judgment and dismissed plaintiff's claim.

A motion and order for devolutive appeal to the Louisiana State Court of Appeal was granted to the plaintiff, Floyd Rood, on March 30, 1981. On June 28, 1982 the Fourth Circuit Court of Appeal affirmed the decision of the District Court.

Plaintiff then sought writs of certiorari and review in the Supreme Court of Louisiana. The Supreme Court of Louisiana denied the plaintiff's application for writ of certiorari on October 8, 1982.

I.

STATEMENT OF REASON FOR THIS COURT TO ISSUE WRIT AND ARGUMENT THEREFOR ON ISSUE NO. I

A resolution of the issues presented herein will eliminate an unfair circumvention of this Court's holding in *Herbert v. Lando.*, 441 U.S. 153 (1979).

This case involves a public figure plaintiff who has brought a defamation action and must prove "actual malice" (i.e. knowledge that the statement was false or reckless disregard of whether it was false or not) to recover. The defendant news organization filed a motion for summary judgment and in support thereof filed affidavits of persons involved in the organization's editorial process. Each affidavit asserted that the affiant could not recall any information regarding the editorial process utilized in the preparation of the article or in the change of the wording to "his drug addiction problem". The defendant then asserted as the primary grounds for summary dismissal that the plaintiff could not determine the defendant's state of mind in making the change and therefore could not prove "actual malice" as required by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1954); and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1975). In other words, plaintiff was presented with the classic catch 22. He could not determine defendant's state of mind because defendant could not or would not recall the relevant events surrounding the publication of the article. Consequently, since defendant did not remember the relevant events surrounding publication of the article, plaintiff could not prove by direct evidence defendant's state of mind and his case was dismissed. The result is outrageously unfair.

The issue herein raised is novel. This Court has clearly held that the public figure plaintiff in a defamation action must prove "actual malice". Yet in this case, the plaintiff was precluded from discovering facts relevant to the defendant's malicious state of mind because the district court granted defendant's motion for summary judgment based solely on the defendant's self-serving affidavits that their employees could not recall the relevant facts surrounding the defamatory publication. It is submitted that the Louisiana district court's dismissal of this case, if allowed to stand, establishes a gaping loophole through which unscrupulous defendants may entirely circumvent this court's rationale and objective as established in *Herbert v. Lando*, 441 U.S. 153. *Herbert* allows the discovery of information regarding the defendant news organization's editorial process and state of mind. This case presents an issue that inextricably arises from the *Herbert* principle. Specifically, should a precedent be established based on the lower Court holdings in this case, future plaintiffs could be precluded from showing actual malice on the part of the individuals responsible for the publication of defamatory articles. Moreover, if as a result, a trial court then grants summary judgment, as occurred herein, the plaintiff is entirely precluded from presenting *any* evidence of actual malice and denied access to the courts. Clearly, such a result, obtained solely by the assertions of individuals who claim loss of memory, circumvents this court's objective as outlined in *Herbert, Butts* and *New York Times*. It is submitted that by following the procedure utilized in this case, a news organization could establish virtual immunity from defamation actions brought by public figures. If all the defendant news organization has to do to obtain summary judgment is submit affidavits which testify to an inability to recall pertinent information, the public

figure plaintiff is effectively precluded from proving his case, though there may be adequate circumstantial evidence of actual malice.

It is respectfully submitted that this court could fashion a remedy to prevent this circumvention of the *Herbert* principle by granting certiorari in this case. This court could clarify the burden placed upon a defendant news organization when moving for summary judgment in a public figure defamation action and require such a defendant to show the *absence of actual malice*, in a situation where its employees are unable to explain the publication of the defamatory statement. Finally, by clearly specifying that such a defendant will bear the burden of showing the absence of malice, this court will prevent its requirements for editorial process and "state of mind" discovery from becoming meaningless concepts; robbed of their validity by the procedural manuevering of ingenious defendants.

II.

STATEMENT OF REASON FOR THIS COURT TO ISSUE WRIT AND ARGUMENT THEREFOR ON ISSUE NO. II

Defendants UPI and Peter Finney, Jr. acted with reckless disregard for the truth when they failed to retract or correct their defamatory statement, irrespective of whether there was actual malice in the initial publication.

Even though *New York Times v. Sullivan* and its landmark principles, are more than sixteen years old many questions produced by that case are yet unanswered or answered only incompletely. One such question is whether a failure to

retract or correct patently erroneous and libelous statements can in-and-of-itself be actual malice, irrespective of the defendant's state of mind or degree of information at the time of the initial publication? *No* case has *answered* this question. Plaintiff maintains that the most supportable answer to that question is *yes.*

The qualified *Times* privilege can be lost when a libelous statement goes uncorrected after the defendant is made aware of the error and recklessly allows the mistake to live on without correction or retraction. The question is: would it have been reckless for the defendant to have published the story if he knew then what he found out when plaintiff requested a retraction? If it would have, then the failure to retract is no less reckless, no less culpable and no more deserving of the protection of the *Times* privilege. UPI of course, did act reckless in publishing the offending statement. Imagine how much more reckless it would have been had the error been clearly pointed out prior to publication and was nonetheless printed. Consequently, the failure to retract is as culpable as if the statement were made with full knowledge of its falsity.

As to Finney, let us assume that his original story did not include the error. Once it is pointed out to him his failure to retract or correct effects a new harm against Mr. Rood. Certainly, as with UPI, had Finney known of the error and published it anyway his assertion of a *Times* privilege would be short-lived at best. Consequently, the failure to retract in light of the clear error, is a new tort recklessly conceived.

The concept of fault by inaction is certainly no stranger to tort. Despite the general hesitation to impose affirmative duties to act many courts have predicated liability upon a

party's failure to act, which exacerbates harm done by another. Let us examine how this would apply to UPI and Finney granting them the most favorable assumption, that is, that they were not reckless in the first instance of publication.

One famous tort case offering a parallel is *Ayres v. Hicks*, 40 N. E. 2d 334 (Ind. 1942), wherein a six-year old child caught his fingers in a department store escalator. In awarding damages to the plaintiff the court admitted that the defendant was faultless in the actual cause of the accident.

> The facts found by the jury conclusively, establish that the appellant was not negligent with respect to the choice, construction, or manner of operating the escalator. . . .[T]he question arises whether it may, nevertheless, be held liable for an aggravation of such injury, and, if so, under what circumstances. *Id* at 336-37

The court went on to admit that there is no general duty to aid one in peril, but that nonetheless circumstances might exist where not to act aggravates harm and is actionable. Consequently, they held the department store liable for the aggravation of the child's injury by not having someone readily available to stop the escalator should an accident occur. The court's generalized principle is most important:

> [I]t may be deduced that there may be a legal obligation to take positive or affirmative steps to effect the rescue of a person who is helpless and in a situation of peril . . . *when the injury resulted from use of an instrumentality under the control of the defendant.* Such an obligation may exist although the accident or original

> injury was caused by the negligence of the plaintiff or through that of a third person and without any fault on the part of the defendant.
>
> Id. at 337.

See also, Depue v. Flotner, 111 N.W. 1 (Minn. 1907) (Duty not to expose one invited into house to danger of cold winter night upon discovering he had been taken ill without fault of defendant); *Tippecano Loan Co. v. Cleveland R. R. Co.*, 104 N.E. 866 (Ind. 1907) (Holding company liable for failing to provide medical assistance to an employee injured without fault of defendant). *Holland v. St. Paul Mercury Ins. Co.*, 135 So.2d 145 (La. App. 1961) (Holding exterminator liable for not knowing contents of poison that plaintiff's child accidentally consumed. Defendants were not at fault in the child's accident, but were responsible for parents' mental suffering because child treatment was delayed and complicated because defendant did not know the poison's contents).

These cases deal with negligence, but recklessness is simply a matter of degree. A jury could certainly determine that defendant's failure to correct or retract *was* reckless and that the duty to retract existed and gave rise to a separate tort.

Recall, also, that the above discussion assumes the defendants' initial innocence *i. e.* freedom from recklessness. This is an assumption *arguendo* and not conceded. In fact, plaintiff alleges that as to UPI there was clear recklessness in the first instance - - exacerbated by not retracting - - and as to Finney plaintiff alleges that malice was shown when he did nothing after meeting with Rood. Obviously, plain-

tiff's argument is that much stronger if either or both defendants are found to be initially reckless.

The view that a failure to retract or correct should constitute a separate tort, though never clearly before any court, finds strong support in the Harvard Law Review article cited below. There the writer strongly supports the view that failure to retract is and should be a separate tort:

> But a failure to retract may have more than an evidentiary effect - - even if the original publication was not made with actual malice, a *Times* defendant may forfeit his privilege if he refuses to retract after a demonstration of the defamatory statement's falsity . . . . Indeed, predicating liability on a refusal to retract seems desirable; a publisher's reticence after falsity has been shown is an intentional rejection of an opportunity to mitigate damages previously inflicted and should result in liability despite the absence of actual malice at the time of publication. In a very real sense, giving currency to a defamatory statement is a knowing or reckless disregard of the truth.
>
> 80 Harvard Law Review 1730 (1967) at 1742.

This comment writer's suggestion is not merely that of an arcane law review speculator. The view he espouses has been directly noted by at least one U.S. Supreme Court Justice. In *Rosenbloom v. Metromedia*, 403 U.S. 29, Justice Brennan, speaking for a plurality of Justices, rejected the argument that private individuals involved in public

events should have an easier burden in proving defamation than public figures. In responding, Justice Brennan said:

> If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than stifling public discussion of matters of public concern.
>
> *Id.* at 47.

In a footnote Justice Brennan made quite clear the significance he attached to retractions as a means of preventing harm when he noted that "[s]ome States have adopted retraction statutes or right-of-reply statutes." *Id.* at 47 N. 15. But, more important, Justice Brennan cited the Harvard Law Review article discussed above as one offering comprehensive insight into the retraction question. Consequently, that article possesses additional significance in deciding the failure to retract question.

Similarly, Justice Powell has emphasized that "[t]he first remedy of any victim of defamation is self-help - - using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation". *Gertz v. Welch*, 418 U.S. 323 at 340. Of course the "self-help" referred to is requests for retractions or correction. Once this remedy has been recklessly denied a separate tort has been committed. Such is the instant case. U.P.I. and Mr. Finney were clearly made aware of the blatant and libelous error included in their article; even an unreasonable person would have sought to correct harm so obviously and unjustifiably done. In the end only a reckless person would have failed to act and act promptly because "[i]n

a very real sense, giving currency to a defamatory statement is a knowing or reckless disregard of the truth". 80 Harv. L. Rev. at 1742.

Furthermore, Defendants U.P.I. and Peter Finney, Jr., acted recklessly by publishing a subsequent story about plaintiff, Rood, without retracting or correcting the initial error.

The second Finney article about Rood came at a time when he and U.P.I., who circulated the second article, knew of the initial error and failed to correct it. This conclusion is amply demonstrated by Mr. Finney's deposition:

At page 35 and 36 of his deposition Finney admitted knowing about the error about two or three days after it was written. Then on page 46 he said:

> Q. Let's start off with have you written any other articles about Mr. Rood other than the article that was produced as Exhibit Number 2?
>
> A. Yes.
>
> Q. All right. When did you write those other articles, or article?
>
> A. It might have been a month later, a very short time later. It was when he hit a golf ball off the Hyatt Hotel, I did a story on that, covering the event. Other than that, that's the only - - this story and that story were the only two stories that I have written.

Even assuming arguendo that all of the other actions of the defendants are less than reckless, can it reasonably be said that failing to correct the error when an opportunity clearly presented itself is not reckless? Surely the answer must be no. What could we say of one who publishes a clearly incorrect and libelous story, is then made aware of the error, but fails to retract it and then heaps insult upon injury by writing another story and completely ignoring the first error and letting it stand as fact? We could only say: outrageous! Or, more important, reckless!

Additionally, because this opportunity was missed, it calls more vividly into question the state of mind of the author and disseminator. What were they thinking when they knowingly rejected an opportunity to make amends? Did they consider the prior error, its consequences and their responsibility? Was their attitude "let him eat cake"? Did they consider contacting Mr. Rood for his feelings about what should be included in the second article?

All of these are fact questions. Moreover, there are state of mind fact questions that are always relevant in defamation cases, and which seldom lend themselves to summary judgment. Accordingly, summary judgment should have been denied.

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondent this date, in accordance with law, by depositing a copy thereof in the U.S. Mail, postage prepaid, to the following:

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DATED JANUARY 6th, 1983.